



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 471 OF 2015

ELECTRIC LINK (EAST AFRICA) LIMITED

JOEL KIOKO MATATA..... APPELLANTS/APPLICANTS

VERSUS

MARY MUENI KIOKO

JOSHUA MUE MUNYAO (Suing as personal representative and for on behalf of the dependants and the estate of DAVID MUNYAO MUE.....RESPONDENTS

RULING

The appellants/applicants **Electric Link (EA) Limited** and **Joel Kioko Matata** by their Notice of Motion dated 12th October 2015 seek from his court orders for stay of execution and all consequential orders arising from Milimani CMCC 4523/2012 pending hearing and determination of this appeal.

The application is premised on the grounds on the body of the Notice of Motion; that the judgment was delivered on 7th September 2015 in favour of the plaintiffs/respondents herein by M/S Chesang Resident Magistrate at Milimani Commercial Court and being aggrieved by that judgment the appellants have lodged this appeal. That there is a high probability of execution issuing and that the applicants have an arguable appeal which raises serious triable thus the need to allow the determination of the appeal on merit and that the execution shall render this appeal nugatory. That the appellants stand to suffer irreparable loss and or harm if the orders sought are not granted and no prejudice will be visited on the respondent if stay is granted and finally that it is in the wider interest of justice that stay be granted. The said application is further supported by the affidavit sworn by George Gitamo Onsombi advocate, reiterating the prayers in the Notice of Motion and the grounds reproduced above while annexing copy of the Memorandum of Appeal filed herein on 6th October 2015 and adding that the respondents are not persons of means and may not be able to refund the decretal sum should the filed appeal succeed.

The application is opposed. The 1st respondent **MARY MUENI KIOKO**

swore a replying affidavit on 15th October 2015 contending that the application is irretrievably defective, bad in law and an abuse of the court process and should be dismissed. Further, that since there was

consent order on liability recorded on 27th July 2015 the only issue being challenged and for determination is quantum as decided by the trial court. It is also deposed that the appeal lacks merit as it proposes the dismissal of suit yet liability was never an issue. That there are no good grounds why the decretal sums should not be released to her.

In the alternative the respondent prays that half of the decretal sum should be released to her since the only issue is quantum and that the appellant will in no way be prejudiced this being a money decree. That the applicant has not offered security yet it is a mandatory requirement. Finally, it is deposed that the applicant had not satisfied the legal requirements for stay pending appeal hence the application should be dismissed.

The parties' advocates canvassed the application orally in court on 21st October 2015. Mr Ondati advocate submitted on behalf of the applicant reiterating the application, grounds and relying wholly on the supporting affidavit of George Gitamo Onsombi.

Mr Ondati submitted that the application had been brought timeously as required under Order 42 Rule 6 (2) of the Civil Procedure Rules and that the appellants are ready, able and willing to deposit security for the due performance of entire decree or part of the decree as a pre-condition for stay if so ordered by this court.

In opposition, Mr Nzioka advocate submitted on behalf of the respondents relying on the affidavit sworn by the 1st respondent that the application does not satisfy the legal requirements for stay pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules. Further, that the applicants had not shown what substantial loss will be suffered if stay was denied. That substantial loss is a question of fact and no evidence was adduced to prove the allegation. Mr Nzioka further submitted that albeit the applicants had deposed that the respondents are of no means, there was no deposition that the applicants know the respondents.

Further, that the affidavit sworn by the applicants' advocate Mr George Gitamo Onsombi is inadmissible as advocates are not to swear affidavits in matters which are contested since he does not know the parties' means.

Mr Nzioka further submitted that the appeal is not arguable since the Memorandum of Appeal seeks dismissal of suit in the lower court whereas judgment on liability was by consent. He nonetheless submitted that should this court be inclined to grant stay of execution of decree pending appeal then at least half of the decretal sum should be released to his clients, the respondents herein to enjoy the fruits of their lawfully obtained judgment as that will not prejudice the appellants and that since at the end of it all, there being judgment on liability, the respondents shall be entitled to some amount of compensation.

In a brief rejoinder, Mr Ondati contended that the respondents had not sworn any affidavit of means and that albeit they may be entitled to some award, this court cannot tell how much it is at this stage until the appeal is heard and determined and that if stay is granted the parties can engage in some form of settlement negotiations.

None of the parties relied on any case law. I have carefully considered the application and response thereto. The law and principles applicable in applications for stay of execution of decree or order pending appeal are now well settled.

The law applicable is to be found in Order 42 Rule 6 of the Civil Procedure Rules, which specifies circumstances under which either the trial court or this court on appeal may order for stay of execution of a decree or order pending appeal.

Order 42 Rule 6 (2) lays down those conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However since enactment of Sections 1 A and 1B of the Civil Procedure Act, courts have since 2010 held that the requirements under Order 42 Rule 6(2) for

stay to be granted are only but guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.

The applicant must satisfy the court that they stand to suffer substantial loss if stay is not granted and that the application has been made without unreasonable delay. The applicants must also show that they are willing to offer such security as may be binding on them as may be ordered by the court for the due performance of decree.

Whether or not to grant stay of execution of decree pending appeal is a matter of judicial discretion to be exercised in the interest of justice. The purpose of stay of execution of decree pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. **See Butt Vs Rent Restriction Tribunal Madan, Miller and Porter JJA.** However, in doing so, the court has to weigh against the success of the litigant who should not be deprived of the fruits of a lawfully obtained judgment. The court is therefore called upon to ensure that neither party suffers prejudice. The above position was espoused in the case of **Ms Port Reitz Maternity V James Karanga Kaba; CA 63/97** where the Court of Appeal stated:

“That right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

In applying the above established principles of statutory and case law to this case, the applicant submitted that the respondents are of no means and that should the decretal sum be paid to them and the appeal is successful, they shall not be in a position to reimburse the decretal sum. As a result, that the appellant shall suffer irreparable loss/damage.

I agree with the respondent’s counsel that the applicants have basically not demonstrated what loss they will suffer if the application for stay of execution of decree pending appeal is not granted.

In **Equity Bank Ltd V Taiga Adams Company Ltd, CA 722/2000** the court stated and I agree that:

“.....the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent that is execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant..”

The respondents’ counsel has taken issue with the appellant’s counsel swearing an affidavit on behalf of his clients on contested matters, especially the deposition that they are persons of no means. I agree that the question of means is a question of fact. It is not sufficient for an advocate to depose that. That the plaintiffs are not persons of means may not be able to refund the decretal amount should the filed appeal succeed. The advocate does not state how he came to learn/know of the respondent’s impecunuity or from what sources of information. Nonetheless the respondents in their replying affidavit have not countered that allegation other than raising the objection to an adversary’s advocate swearing to matters which are contested, against established practice that bars advocates to do so.

The law as it is requires that where there is an allegation that the respondent is not possessed of means, the burden of proof shifts to the respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful they shall be in a position to reimburse/refund the decretal sum. But that lack of means in itself does not necessarily deprive the respondent of their right to a lawful judgment, and neither does it render an appeal in a money decree nugatory should the money be paid out and the appeal is successful, particularly where substantial loss has not been shown like in this case.

Furthermore, albeit the applicant contends that they shall suffer substantial loss, no attempt was ever made to disclose how much was the award or decretal sum in CMCC 4523/2012 such that this court is not able to discern that the award was so substantial that if paid out to the respondents and the appeal succeeds in whole, then they may not be in a position to reimburse thereby rendering this appeal nugatory.

The respondents' counsel has also deposed that the appeal herein should only be challenging the question of quantum of damages assessed by the trial court since judgment on liability was entered by consent of both parties. The applicant has not made any submissions to rebut that contention. I have also perused the Memorandum of appeal filed on 6th October 2015 and from grounds 1,2,3,4,5, 6 and they all relate to the question of quantum of damages. However, in the prayers thereof the applicant/appellant prays as follows:-

- a. That the appeal be allowed with costs.
- b. That the judgment of the subordinate court and consequential orders therefrom be set aside with costs to the appellants both in the lower court and on appeal.
- c. That Civil Milimani Chief Magistrate's case No. 4523 of 2012 be dismissed with costs.

I find the above prayers inconsistent with the grounds of appeal, which leaves this court with no alternative but to find that the appeal is fanciful.

On whether the application was filed without undue delay, the decision of the trial court is said to have been delivered on 7th September 2015. This application was lodged in court on 13th October 2015, seven days after the filing of an appeal and slightly over 35 days of the date of judgment in the trial court. There is no explanation why this application was brought after the period of filing of an appeal which is 30 days. Nonetheless, I find that the application though filed after 30 days, the delay is not inordinate.

On the issue of security, the applicant submits that they are ready to deposit part or the whole of decretal sum in court pending determination of the appeal, to secure the decree. The respondents seek for part of the decretal sum-at least half as the appeal is only against quantum, liability having been settled. The applicants' counsel did indicate that once stay is granted the parties can engage with a view to a settlement.

The requirement for deposit of security under Order 42 Rule 6 (2) of the Civil Procedure Rules guarantees the performance of decree should the appeal fail while on the other hand, the appellant is assured that if the appeal is successful, it will get the whole amount secured. That requirement, in my view, confers upon this court the unfettered discretion to be exercised judicially, to grant a conditional stay of execution, pending appeal, depending on the circumstances of each case.

In the circumstances of this case, it is clear that there is no disclosure of how much the decretal sum is. The appeal is against quantum only albeit the prayers seek dismissal of the suit in the court below. The applicant is ready to offer security for due performance of decree as may be ordered by the court. The application for stay was also brought without undue delay; the applicant is willing to negotiate for settlement after obtaining stay; there is no evidence of any substantial loss likely to be suffered by the applicant if stay is not granted.

It therefore follows that this court should not be obsessed with the protection of the appellant in total disregard of fitting mention of the far successful opposite party otherwise it will be flirting with one party as crocodile tears are shed for the other, contrary to sound principles for exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way application for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court. (See Machara T/A

MACHIRA & CO. Advocates V E.A Standard No. (2).

In this case, albeit the applicants have not demonstrated substantial loss that is likely to be occasioned to them should execution issue, they have nonetheless offered the whole of the decretal sum in court to secure performance of decree. I however note that it is not disputed that the appeal is only against quantum and as to whether that appeal is arguable or has overwhelming chances of success is not for this court to determine at this stage save that the appeal is not frivolous on the face of it. Balancing out the interests of a successful party who is entitled to the fruits of his judgment and the appellant's right of appeal, I would in the circumstances of this case exercise my unfettered discretion and grant a conditional stay of execution of decree made in Milimani CMCC 4523 of 2012 on 7th September 2015 in the following terms:

- i. There shall be stay of execution of decree in Milimani CMCC 4523/2012 pending hearing and determination of this appeal conditional upon the appellant paying to the respondents half of the decretal sum within 14 days from the date thereof.
- ii. The other half of the decretal sum to be deposited in a joint interest earning commercial bank account to be opened and held jointly by the advocates for the appellants and respondents within 21 days from the date thereof until the hearing and determination of this appeal or as may be ordered by this court.
- iii. In default thereof the stay herein granted shall lapse and execution to proceed unless such period is enlarged by the court.
- iv. The costs of this application shall be in the appeal.

Dated, signed and delivered in open court at Nairobi this 23rd day of November, 2015

R.E. ABURILI

JUDGE

23.11.2015

Coram R.E. Aburili J

C.A. Adline

Mr Kuria holding brief for Onsomi for the applicant

No appearance for respondent

Court – Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

23/11/2015